89-434

No. _____

In The

United States Supreme Court

October term, 1988

Archie Julien,
Petitioner,

v.

Agnes S. Baker,
Respondent.

Appendix for Petitioner

Archie W. Julien, Pro Se
909A Foster
College Station, TX 77840

(409) 693-8538

26 pp

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TABLE OF CONTENTS

No. 28,663-272

AGNES S. BAKER	§	IN THE DISTRICT COURT
	§	
VS.	§	OF BRAZOS COUNTY, TEXAS
	§	
ARCHIE JULIEN	§	272ND JUDICIAL DISTRICT

JUDGMENT

On the 18th day of May, 1987, came on to be heard the above-entitled and numbered cause wherein AGNES S. BAKER, as Plaintiff, and ARCHIE JULIEN as Defendant, appeared in person and by their respective attorneys of record and announced ready for trial. No jury having been demanded, all matters of fact and things in controversy were submitted to the Court. The Court, after hearing the evidence and arguments of counsel, makes the following orders:

IT IS ORDERED that Plaintiff have title to and possession of the real property described in Exhibit "A" attached hereto and incorporated by reference the same as if fully set forth at length, (signed for identification) said property being located in Brazos County, Texas.

IT IS FURTHER ORDERED that all other relief not expressly granted herein is denied and that all costs of Court incurred herein are taxed against the party by whom incurred.

SIGNED this 6th day of July, 1987.

(Signed by Judge)
JUDGE PRESIDING

(End page 1)

(Exhibit "A" follows)

FIELD NOTES

0.022 Acre Tract

Being all of that certain tract or parcel of land, lying and being situated in College Station, Brazos County, Texas, and being a part of Lot 14, Block 2 of the COLLEGE HILLS ESTATES - First Installment to the City of College Station, Texas according to a plat recorded in Volume 96, Page 499 of the Deed Records of Brazos County, Texas, and being more particularly described as follows:

BEGINNING: at an iron rod set in concrete at the northeast corner of said Lot 14, same being in the west right-of-way line Walton Ave., also being the southeast corner of Lot 13, Block 2;

THENCE: S 14°20'23" W - 6.85 feet along said Walton Ave. line to an iron rod found for corner;

THENCE: N 75°01'36" W - 235.00 feet across said Lot 14 to an iron rod found for corner;

THENCE: N 0°37'42" W - 1.45 feet to an iron rod set in concrete for corner; same being the southwest common corner between said Lots 13 & 14;

THENCE: S 76°21'12" E - 235.38 feet along the common line between said Lot 13 & 14 to the PLACE OF BEGINNING; and containing 0.022 acres of land, more or less, according to a survey made on the ground under the supervision of Donald D. Garrett, Registered Public Surveyor, No. 2972, on June 16, 1987.

(End Exhibit "A")

Affirmed and Opinion filed September 15, 1988.

(State Seal)

In The

Fourteenth Court of Appeals

NO. C14-87-00630-CV

ARCHIE JULIEN, Appellant

V.

AGNES S. BAKER, Appellee

On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 28,663-272

OPINION

This is an appeal from a judgment in favor Appellee awarding her title to a .022 acre triangular shaped tract of land by virtue of adverse possession. We affirm.

On June 30, 1958, Appellee and her spouse purchased a home in the city of College Station, Texas. The legal description of the property purchased is Lot Thirteen, Block Two, College Hills

Estates, First Installment. At the time they purchased the property Appellee had the land surveyed in order to locate the boundaries of the property. This survey was performed by Mr. J.S. Harrison, a registered public surveyor, and will be referred to as the "Harrison Survey."

(End page 1)

Mr. Harrison installed iron marker pins at the corners of the lot and Appellee used these markers as reference points for the boundaries of the lot when she landscaped her property. She planted a hedge and several trees on the boundary line between her lot and adjoining vacant Lot No. 14. Appellant and her family have continuously maintained, cultivated and used the land within these survey markers since 1958.

In December, 1984, Appellant began negotiations with a third party concerning the purchase of Lot 14, and a portion of Lot 15. Appellant purchased this property in August 1985. Prior to his purchase of this property, Appellant hired Mr. Donald

D. Garrett, a registered public surveyor, to perform a survey. This survey will be referred to as the "Garrett Survey." This survey revealed a discrepancy in the common boundary line between Lot 14 and Appellee's property, Lot 13. Therefore, Appellant knew of the adverse claim prior to his purchase of Lot 14. Appellant brought the discrepancy to Appellee's attention and the ensuing dispute resulted in the present lawsuit when Appellant threatened to erect a privacy fence enclosing the disputed strip of land.

The parties stipulated at trial that Appellee is the owner of Lot 13 and Appellant is the owner of Lot 14 "subject to whatever rights of limitation or adverse possession that Mrs. Baker is able to establish in that the common boundary line between those two lots is the boundary line as determined by Bill Kling and Don Garrett, two separate surveys that have heretofore been made." The case was submitted to the court for determination

and the court rendered judgment for Appellee and awarded her title in the disputed land. Appellant failed to make a timely request for findings of fact and conclusions of law and none were issued by the trial court.

(End page 2)

Appellant asserts five points of error on appeal. In his first two points of error, Appellant alternatively contends there was no evidence or insufficient evidence that Appellee possessed the intent necessary to ripen limitation title to the disputed strip. In his third point of error, Appellant asserts that Appellee judicially admitted that she did not possess the intent necessary to ripen a limitation title.

In a non-jury trial, where no findings of fact or conclusions of law are filed or requested, it will be implied that the trial court made all the necessary findings to support its judgment. *Burnett v. Motyka*, 610 S.W.2d

735, 736 (Tex. 1980). These implied findings may be challenged on appeal by "insufficient evidence" or "no evidence" points the same as a jury's findings and a trial court's findings of fact. *Burnett v. Motyka*, 610 S.W.2d at 736. In resolving no evidence points of error, we consider only that evidence favorable to the judgment and disregard all that which is opposed to it. *International Bank, N.A. v Morales*, 736 S.W.2d 622, 624 (Tex. 1987). However, in reviewing insufficient evidence points, we must consider and weigh all the evidence, including any evidence contrary to the trial court's judgment. *Burnett v. Motyka*, 610 S.W.2d at 736; In *re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1952).

TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986) states in pertinent part:

> (a) A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession

by another who cultivates, uses or enjoys the property.

Adverse possession is statutorily defined as "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person. TEX CIV. PRAC. &

(End page 3)

REM. CODE ANN. § 16.021(1) (Vernon 1986). No matter how exclusive and hostile to the true owner the possession of the land may be, the possessor must intend to appropriate it. *Calfee v. Duke*, 544 S.W.2d 640, 642 (Tex. 1976).

Appellant asserts that Appellee's testimony that she believed the disputed tract was in the deed to Lot 13 and never intended to take anyone else's land constitutes a judicial admission that she did not possess the requisite intent. We disagree.

Often the statements of the adverse claimant are, or appear to be, inconsistent. In such instances it is

generally held that a fact issue exists on the issue of his intent to claim the land. *Calfee v. Duke*, 544 S.W.2d at 642; *Pearson v. Doherty*, 143 Tex. 64, 183 S.W.2d 453, 456 (1944); *Stewart v. Luhning*, 134 Tex. 23, 131 S.W.2d 824 (1939); *Payne v. Priddy*, 371 S.W.2d 783, 784 (Tex. Civ. App. - Fort Worth 1963, no writ). The trial court has found all fact issues in favor of Appellee; therefore, it is irrelevant whether her testimony was inconsistent. *Calfee v. Duke*, 544 S.W.2d at 642. Appellee testified she believed the boundary line to her lot was delineated by the surveyor's iron pin markers, and that when she and her husband planted the trees and privet hedge, they located the iron pin markers and ran a string between them, "So we wouldn't plant our shrubbery and trees on the other property." She stated that the purpose of planting the hedge was, "[T]o let our children know that they were not to play on other people's properties, and that was

a line -- we couldn't afford a fence so we put up the shrubbery." She also stated that the water meter installed by the utility company to monitor the water usage for her property was located on the disputed strip of land. On cross-examination, she testified as follows:

> Q: You strung that line where you did because you had no intent to claim any property other than what was described in your Deed; is that not correct?
>
> (End page 4)
>
> A: That was surveyed that way and that's what we were told that's where the property line was. It's our original survey.
>
> Q: Did you ever state to anyone that that property that you were mowing and where your hedges were located, that you were claiming that as your own no matter what?
>
> A: Well, they were mine.

She further testified on rebuttal that it had been her intent all along to use that property and appropriate it for her own use.

It is clear from the record that Appellee did not consider that she was claiming the property adversely to anyone for the simple reason that for 28 years she thought she was the rightful owner of the land.

Further, Appellee manifested this claim of right by open and visible possession and use of the property. The evidence shows that immediately after moving into the house on Lot 13, Appellee and her family began landscaping the yard and planted a privet hedge and trees on the boundary line between Lot 13 and Lot 14 as delineated in the Harrison Survey. They also planted St. Augustine grass up to the boundary line and planted additional shrubbery and flowers on the disputed strip. Since 1958, Appellee has continuously and uninterruptedly cultivated, maintained and used the disputed property to the exclusion of all others. They have mowed the grass, trimmed

the hedges, and pruned the trees and shrubs on the disputed tract.

Mr. and Mrs. Black, previous owners of Lots 14 and 15, lived in a house on Lot 15 for many years. Lot 14 has remained vacant and is entirely overgrown with weeds so that the boundary between the property claimed by

(End page 5)

Appellee and the vacant lot is clearly visible. Appellee testified that at no time did the Blacks question her ownership of the disputed strip of land.

Mr. Adams, who purchased Lots 14 and 15 from Mr. and Mrs. Black's heir, testified that he had not thought about the boundary line but "would have assumed" that the property line between Lots 13 and 14 was at the edge of the area that was mowed and that the hedges and trees would go with Appellee's house.

Ms. Price lives across the street from Appellee. She testified that she often saw Appellee and her family working

in their yard. She stated that she "assumed it was their yard where they had mowed to" and that if she had known that the property line was actually six and one-half feet inside the point to which they mowed, she would have been "put on notice that they were out there cultivating and using some property that didn't belong to them."

Further, Appellant testified that after Mr. Garrett informed him of the discrepancy in the boundary line, he looked at the property and, "It was obvious that they [the Bakers] occupied the land" that lay within that disputed strip.

It has been held that maintaining a pre-existing hedge and mowing grass located on a disputed parcel of land and keeping the land in the condition in which the claimant's grantor kept it do not constitute a hostile character of possession sufficient to give notice of an exclusive adverse possession. *Bywaters v.*

Gannon, 686 S.W.2d 593, 595 (Tex. 1985); *Miller v. Fitzpatrick*, 418 S.W.2d 884, 890 (Tex. Civ. App. - Corpus Christi 1967, writ ref'd n.r.e.); *Surkey v. Qua*, 173 S.W.2d 230, 232 (Tex. Civ. App. - San Antonio 1943, writ dism'd w.o.m.). However, no previous case had addressed the issue of whether planting a hedge is a sufficiently hostile action. We hold that planting a hedge on the asserted property line of the

(End page 6)

tract to create a barrier or "fence" between the properties is a sufficiently permanent, visible and unequivocal act to evidence a hostile character of possession which is sufficient to give notice to the true owner of the claimant's adverse possession.

Therefore, we find Appellee's claim of right, coupled with her actual and visible possession and use of the property, sufficient to satisfy the statutory requirements. Appellee's claim

of right cannot be defeated by her lack of knowledge of the error in the survey or by her failure to realize that there could be other claimants for that strip of land. *Calfee v. Duke*, 544 S.W.2d at 642; *Ybarra v. Newton*, 714 S.W.2d 353, 355 (Tex. App. - Corpus Christi 1986, no writ). Points of error one, two and three are overruled.

In his fourth and fifth points of error, Appellant alternatively asserts that there is no evidence and pleadings, or insufficient evidence and pleadings, to identify or locate the exact dimensions of the tract of land awarded to Appellee by the trial court. We find these contentions entirely without merit. The trial court's judgment states in pertinent part:

> IT IS ORDERED that Plaintiff have title to and possession of the real property described in Exhibit "A" attached hereto and incorporated by reference the same as if fully set forth at length (signed for identification), said property being located in Brazos County, Texas.

Exhibit "A" referred to in the judgment consists of the field notes for a survey of the disputed strip of land conducted under the supervision of Mr. Garrett on June 16, 1987. These field notes recite the lot and block numbers of the property and describe the strip of land by metes and bounds using the concrete monuments noted in the Garrison Survey and the iron pins placed in the ground during the Harrison Survey as reference points.

(End page 7)

The party claiming title by virtue of adverse possession has the burden of alleging or proving a description of the property claimed by them. *Coleman v. Waddell*, 151 Tex. 337, 249 S.W.2d 912, 913 (1952). The claimant must identify the land to establish its location and to show the extent of its interest in the land claimed. *Jones v. Mid-State Homes, Inc.*, 163 Tex. 229, 356 S.W.2d 923, 925 (1962). However, the general test for determining the sufficiency of a description of the

land is whether the tract can be identified with reasonable certainty. *Zobel v. Slim*, 576 S.W.2d 362, 369 (Tex. 1978).

We find that there is sufficient evidence in the record by which the disputed strip of land may be identified with reasonable certainty. The parties stipulated at trial that the correct boundary line between Lots 13 and 14 was that delineated by the concrete monuments reflected in the Kling and Garrett Surveys. Appellee's First Amended Petition alleged that, "It is the Harrison Survey upon which Plaintiff relies for establishment of the boundary lines of the property purchase." Appellee testified that iron pins were placed in the ground to mark the corners of Lot 13 when the Harrison Survey was performed. She further testified that the concrete monuments were established on the property when the Kling Survey was conducted in 1966. She agreed that the disputed strip was the triangle

"formed by the line from the Harrison point to the back, and then back down to the Kling point." Plaintiff's Exhibit 5 depicts this triangular strip of land and clearly notes its boundaries as those delineated by the Harrison Survey and the Kling-Garrison Survey. Both the Harrison Survey and the Garrett Survey were admitted into evidence at trial. We hold that this evidence provides a description of the disputed tract which is sufficient to identify it with reasonable certainty so that it may be located upon the ground. Points of error four and five are overruled.

(End page 8)

Accordingly, the judgment of the trial court is affirmed.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed September 15, 1988.

Panel consists of Justices Junell, Sears and Draughn.

Publish. TEX. R. APP. P. 90.

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

October 13, 1988

Hon. M. Charles Gandy
2405 Texas Avenue South
Suite 301
College Station, TX 77840

Hon. Michael W. Middleton
P.O. Box 4884
Bryan, TX 77805

Hon. D. Michael Holt
Caperton, Rodgers & Miller
Post Office Box 4884
Bryan, TX 77809

RE: CASE NO. 14-87-00630-CV
TRIAL COURT CASE NO. 28,663-272

STYLE: Julien, Archie
V: Baker, Agnes S.

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, November 14, 1988.

Respectfully yours,

MARY JANE SMART, CLERK

By_____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

February 22, 1989

Mr. Archie Julien
909A Foster
College Station TX 77840

Mr. Michael W. Middleton, P.C.
4500 Carter Creek Parkway
Suite 109
Bryan TX 77802

Mr. D. Michael Holt
Caperton, Rodgers & Miller
P.O. Box 4884
Bryan TX 77805

RE: Case No. C-8136

STYLE: ARCHIE JULIEN
V. AGNES S. BAKER

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied. Petitioner's motion to strike respondent's reply to application is overruled.

Respectfully yours,

Mary M. Wakefield, Clerk

By_____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 10, 1989

Mr. Archie Julien
909A Foster
College Station TX 77840

Mr. Michael W. Middleton
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4500 Carter Creek Parkway
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Bryan TX 77802

Mr. D. Michael Holt
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Bryan TX 77805

RE: Case No. C-8136

STYLE: ARCHIE JULIEN
v. AGNES S. BAKER

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By_____
Deputy

CERTIFICATE OF SERVICE

I hereby certify that 3 true and correct copies of the above and foregoing Petitioner's filing has been mailed by certified mail, return receipt requested, to the following attorneys of record: Mr. Michael W. Middleton, 4500 Carter Creek Parkway, Suite 109, Bryan Texas 77802; and Mr. Michael Holt, Capperton, Rodgers & Miller, P.O. Box 4884, Bryan, Texas 77805, on this the 8th day of September, 1989.

ARCHIE WARD JULIEN